

91-2051

NO. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF SOUTH DAKOTA IN ITS OWN
BEHALF, AND AS PARENS PATRIAE,

Petitioner,

v.

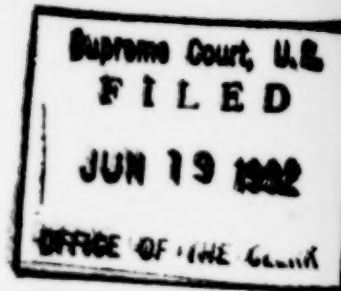
GREGG BOURLAND, PERSONALLY AND AS CHAIRMAN
OF THE CHEYENNE RIVER SIOUX TRIBE AND
DENNIS ROUSSEAU, PERSONALLY AND AS DIRECTOR
OF CHEYENNE RIVER SIOUX TRIBE
GAME, FISH AND PARKS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATE COURT OF APPEAL
FOR THE EIGHTH CIRCUIT

MARK BARNETT
ATTORNEY GENERAL
State of South Dakota
Counsel of Record

John P. Guhin
Deputy Attorney General
500 E. Capitol
Pierre, SD 57501-5070
Telephone: (605) 773-3215
Counsel for Petitioners



QUESTION PRESENTED

DOES THE CHEYENNE RIVER SIOUX TRIBE HAVE
AUTHORITY TO REGULATE NON-INDIANS HUNTING AND
FISHING ON LANDS AND OVERLYING WATERS
ACQUIRED IN FEE BY THE UNITED STATES FOR
CONSTRUCTION AND OPERATION OF THE OAHE
RESERVOIR WITHIN THE TRIBE'S RESERVATION
UNDER THE FLOOD CONTROL ACT OF 1944 AND THE
1954 CHEYENNE RIVER ACT?

TABLE OF CONTENTS

	<u>PAGE</u>
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTIONAL STATEMENT	2
TREATY AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	3
REASON FOR GRANTING THE WRIT	20
THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH OPINIONS OF THIS COURT.	
CONCLUSION	46

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE</u>
<u>Brendale v. Confederated Bands and Tribes of the Yakima Nation,</u> 492 U.S. 408 (1989)	Passim
<u>Burlington Northern Railroad Co. v. Blackfeet Tribe of the Blackfeet Indian Reservation, No. 91-545</u>	45
<u>Duro v. Reina,</u> 495 U.S. 676 (1990)	39
<u>Fletcher v. Peck,</u> 10 U.S. (6 Cranch) 87 (1809)	38
<u>Montana v. United States,</u> 450 U.S. 544 (1981)	Passim
<u>United States v. Dion,</u> 476 U.S. 734 (1986)	Passim
<u>United States v. Wheeler,</u> 435 U.S. 313 (1978).	22, 25
<u>Washington v. Confederated Bands and Tribes of the Yakima Indian Nation,</u> 439 U.S. 463 (1979)	30
<u>STATUTORY REFERENCES:</u>	
28 U.S.C. § 1254(1)	3
28 U.S.C. § 1331	3
28 U.S.C. § 1337	3
28 U.S.C. § 1343(4)	3
(iii)	

OTHER:

_____ Cong. Rec. 13160 (Aug. 3, 1954)	30
H.R. Con. Res. 108	29
H.R. Doc. No. 475, 78th Cong., 2d Sess. (1944)	11
H.R. 5372, 1st Cong., 1st Sess. (1949)	11
H.R. 2484, 83rd Cong., 2d Sess. (1954)	13
H.R. No. 1047, 81st Cong., 1st Sess. (1948)	19
H.R.Rep.No. 2484, 83rd Cong., 2d Sess. (1954)	30
S.Doc.No. 191, 78th Cong., 2d Sess. (1944)	11
S.R. No. 1737, 81st Cong., 2d Sess. (1954)	19
Pub. L. 534, 58 Stat. 887 (1944), § 4 (Flood Control Act of 1944)	Passim
Pub.L. No. 870, 64 Stat. 1093 (1950)	3
Pub.L. No. 776, 68 Stat. 1191 (1954) (Cheyenne River Act of 1954)	Passim

Lawson, <u>Reservoir and Reservation: the Oahe Dam and the Cheyenne River Sioux</u> , 37 S.D. Historical Collections 102, (1974)	18
South Dakota Department of Game, Fish and Parks, <u>South Dakota Sportsman's Atlas</u> , 1990	43
U.S. Department of Agriculture, Forest Service Visitors Map, <u>Grand River-Cedar River National Grasslands, North and South Dakota</u> , Fifth Principal and Black Hills Meridian (1981)	42

IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF SOUTH DAKOTA IN ITS OWN
BEHALF, AND AS PARENS PATRIAE,

Petitioner,

v.

GREGG BOURLAND, PERSONALLY AND AS CHAIRMAN
OF THE CHEYENNE RIVER SIOUX TRIBE AND
DENNIS ROUSSEAU, PERSONALLY AND AS DIRECTOR
OF CHEYENNE RIVER SIOUX TRIBE
GAME, FISH AND PARKS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

The petitioner State of South Dakota
respectfully prays that a writ of certiorari
issue to review the judgment and opinion of
the United States Court of Appeals for the

Eighth Circuit, entered in the above entitled proceeding on November 21, 1991.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals appears at 949 F.2d 984 (8th Cir. 1991) and is printed in the Appendix at A-1. The opinion of the District Court on the merits is unreported and is printed in the Appendix at A-56. The Memorandum Opinion of the District Court denying a Preliminary Injunction is printed in the Appendix at A-161. The Memorandum Opinion of the District Court denying a Motion to Dismiss is set in the Appendix at A-217. The Temporary Restraining Order issued by the District Court is printed in the Appendix at A-180.

JURISDICTIONAL STATEMENT

The Judgment of the Eighth Circuit Court of Appeals was entered on November 21, 1991. Appendix at A-52 to 54. The Petitioner's Petition for Rehearing and Suggestion for

Rehearing En Banc were denied on March 23, 1992. Appendix at A-55. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

TREATY AND STATUTORY PROVISIONS

Flood Control Act of 1944, Pub. L. 534, 58 Stat. 887 (1944), Section 4. Appendix at A-185.

Pub.L. No. 870, 64 Stat. 1093 (1950). Appendix at A-187.

Cheyenne River Act of 1954, Pub.L. No. 776, 68 Stat. 1191 (1954). Appendix at A-195.

STATEMENT OF THE CASE

This is a hunting and fishing controversy with broad policy and practical implications. The jurisdiction of the district court was invoked under 28 U.S.C. § 1331, 1343(4) and 1337.

1. Decision below.

In the decision below, the Court of Appeals found that an Indian tribe could exercise civil regulatory jurisdiction over non-Indians on approximately one-hundred thousand acres of fee land and overlying waters taken from Indians by the United States for construction and operation of the Oahe Reservoir under the Cheyenne River Act, Pub. L. No. 776, 68 Stat. 1191 (1954).¹ In

¹The District Court below applied Montana v. United States, 450 U.S. 544 (1981) and found that the Tribe did not have civil regulatory jurisdiction over nonmembers in the taken area. Following a comprehensive survey of the evidence produced at a six day trial the Court concluded that the "tribe need not regulate hunting and fishing activities of nonmembers on the taken area. . . to protect its political integrity, economic security or health and welfare." District Court Opinion, A-89. The Court of Appeals did not undermine this factual determination. The District Court also found, pursuant to the opinion of Justice Stevens in Brendale, that the taken area was

(Footnote Continued)

rendering its decision, the Court of Appeals pointedly refused to rely upon this Court's decisions involving tribal civil regulatory jurisdiction over non-Indians on fee land: Montana v. United States, 450 U.S. 544 (1981) and Brendale v. Confederated Bands and Tribes of the Yakima Nation, 492 U.S. 408 (1989).

(Footnote Continued)

not a "pristine area" and that the tribe had never denied nonmember access or even monitored such access. Id. at A-87. The District Court held that the tribe had not shown any "unique cultural, spiritual, or religious significance attaches to the taken area. . . ." Id. at A-87. The Court of Appeals seems to have agreed with this finding. See, Circuit Court Opinion, A-45, 46. (applying this finding to the taken area acquired from non-Indians).

Other holdings of the District Court are not at issue here. The District Court found that the tribe did not have civil regulatory jurisdiction over non-Indians on the main body of the reservation (other than the taken area); the tribe did not appeal this portion of the decision. In addition, the District Court also found that the reservation had not been diminished by the 1954 Taking Act; the State did not appeal this portion of the decision.

Circuit Court Opinion, A-26 and 27, A-39, A-41 at n.18. Instead, the Court of Appeals analyzed the jurisdictional issue principally in terms of United States v. Dion, 476 U.S. 734 (1986) a case involving abrogation of treaty rights granted to Indians under the general authority of the 1944 Flood Control Act, Pub. L. No. 534, 58 Stat. 887 (1944). Circuit Court Opinion, A-40. Applying that standard, the Court of Appeals concluded that the Tribe "retains" civil regulatory authority over non-Indians on the federally owned fee land because Congress had not, in acquiring this land from Indians in fee, expressly considered the conflict between its actions and Indian treaty rights and had not expressly abrogated the treaty right. Circuit Court Opinion, A-40 and 41.

The Court of Appeals also found that the tribe could potentially exercise civil regulatory jurisdiction over non-Indians on

approximately 18,000 acres of fee land and overlying waters taken from non-Indians by the United States for construction of the reservoir. The Court of Appeals indicated that such tribal jurisdiction would exist on the federal fee lands if either of the two Montana exceptions were present. These exceptions relate, of course, to consent of the non-Indians and to conduct of the non-Indians which threatens or has some direct effect on the political integrity, the economic security or health or welfare of the tribe. Circuit Court Opinion, A-46, n.20 (quoting Montana v. United States, 450 U.S. at 1258.) The Court of Appeals also implied that the District Court on remand should find that the tribe could have jurisdiction over non-Indians on the fee lands of the United States if the original acquisition of the lands by the non-Indians (prior to conveyance of the lands to the United States) had not

been "pursuant to an allotment act." Circuit Court Opinion, A-45, n.19. Consistent with the remainder of its decision, the Court of Appeals apparently meant for there to be a Dion style analysis of any non-Allotment act fee lands.²

²The tribal respondents did not, in this litigation, challenge the state's authority to also exercise jurisdiction over non-Indians in the "taken area" although, of course, they were well aware of the States enforcement activity. Indeed, the Tribe successfully resisted the states contention that the issue of state authority over non-Indians had been properly raised. See, District Court Opinion, A-116 to 118. See also, Court of Appeals Opinion at A-20, n.13. As a result, if the tribal respondents prevail in the present litigation, the stage is set for further litigation, presumably brought by the Tribe or some other person on entity, to challenge the viability of the state's exercise of concurrent jurisdiction in the "taken area" in the hunting and fishing context. See generally, United States v. Montana, 604 F.2d 1162, 1171 (9th Cir. 1971) reversed, Montana v. United States, 450 U.S. 544 (1980).

It should also be noted that the Court of Appeals overturned the holding of the

(Footnote Continued)

2. Area immediately involved.

The area immediately impacted by the decision of the Court of Appeals includes approximately 100,000 acres of land and overlying waters acquired in fee by the United States in the 1950's from tribal members for construction and operation of the Oahe Reservoir on the Missouri River. See, 1954 Cheyenne River Act. The area also includes, as noted, approximately 18,000 acres acquired from non-Indians. 1944 Flood Control Act. The entire area is known as the "taken area" and constitutes the eastern boundary of the Cheyenne River Reservation which was created in 1889. A portion of the land acquired is flooded by the Oahe

(Footnote Continued)

District Court that the Tribe did not have civil regulatory jurisdiction over nonmember Indians. The Court of Appeals found that the issue had not been properly raised below. Court of Appeals Opinion, A-18 and 19.

Reservoir and a portion constitutes the shoreline of the Reservoir.

Since construction, the State has developed the Oahe Reservoir into one of the nation's premiere walleye fisheries, District Court Opinion, A-85; and has stocked the reservoir with over seventy-two million fish. Id. The Tribe has taken no part in the development of its fishery and admitted during trial that it had no plans to do so. See TT 506, 521, 839-840; See also, District Court Opinion, A-81, 83.

3. Legislative background.

In 1944, Congress determined to build a series of major reservoirs on the Missouri River. The two plans the "Pick Plan" and "Sloan Plan" were ultimately combined and adopted by Congress by the Flood Control Act

of 1944, Pub. L. 534, 58 Stat. 887 (1944);³ documents accompanying both, the Pick and Sloan Plans recognized that Indian lands would be impacted by the reservoirs. H.R. Doc. No. 475, 78th Cong., 2d Sess. (1944) (the "Pick Plan"), p.4-5; S.Doc.No. 191, 78th Cong., 2d Sess. (1944) (the "Sloan Plan"), p.5.

Legislation allowing negotiation of contracts between the U.S. Army Corp of Engineers and the Cheyenne River Sioux Tribe for lands needed for construction of the Oahe Reservoir was introduced in 1949. H.R. 5372, 1st Cong., 1st Sess. (1949). This bill would have provided for "preservation of treaty rights of the tribe. . . in regard to fishing, hunting, and trapping insofar as

³Lands acquired from non-Indians were acquired under the general authority of this Act. See Circuit Court Opinion, A-9.

practical under the physical conditions existing when the Oahe project is completed." This language was omitted, however, in the final version of Pub.L. No. 870. 64 Stat. 1094 (1950). Efforts to obtain a contract under the 1950 Legislation were unsuccessful, and the entire matter was again submitted to Congress in 1954. Legislation enacted in 1954 proposed an agreement with the Tribe (and later accepted by it). The 1954 Cheyenne River Act provided that the Tribe would convey to the United States "all tribal, allotted, assigned, and inherited lands or interests within the Cheyenne River Reservation belonging to Indians of said reservation. . . . subject, however, to the conditions of this agreement herein set forth. . . ." 68 Stat. 1191 (1954).

The Act carefully provided for substantial compensation for the taking of the land itself, and, in addition, for the

wildlife lost. The annual value to the tribe of the wildlife was estimated to be either \$36,600 or \$77,300. See Missouri River Basin Investigation Report No. 138 at 78 (April 1954). The higher amount was combined with other wild product loss and capitalized at four percent to come up with an ultimate claim of over \$1,857,500 in permanent wildlife and wild product loss to the Tribe. See H.R. 2484, 83rd Cong., 2d Sess. (1954); Ultimately the 1954 Cheyenne River Act provided compensation of \$5,384,014 for land loss, grazing loss, wildlife loss, loss of the bed of the river and other items. 68 Stat. 1191. Additional compensation of \$5,160,000 was provided for "rehabilitation" of the Tribe and its members. 68 Stat. 1192. Furthermore, the Act provided for certain privileges for the Tribe after the taking. Most of the privileges or rights set out in the legislation are exercisable only on the

shoreline. Thus, for example, members of the Tribe were provided the right to remove timber and to remain on and use the taken lands until the gates of the dam were closed. The legislation also provided that the Tribe could graze stock on the unflooded area including land previously held in fee by non-Indians. See 68 Stat. 1192-93.

The Tribe was also provided "all mineral rights . . . within the taking area" 68 Stat. 1192, a right presumably exercisable below the water of the new reservoir. The only right contained in the 1954 Cheyenne River Act which is readily⁴ applicable on the water

⁴Grazing cattle, of course, could in some instances use the water of the reservoir.

itself appears in 68 Stat. 1193 at Section X⁵ as follows:

Tribal council and members of said Indian tribe shall have, without cost the right of free access to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States. (Emphasis added.)

The 1954 Cheyenne River Act, including Section X and the \$10 million compensation, was ultimately accepted by 92% of voting tribal members.

⁵While the Court of Appeals hinted at an analysis which relied upon "retained" rights of the Tribe in the lands of the "taken area," it did not develop that analysis or apply it discretely to the land and water on which different rights were said to be "retained." See Circuit Court Opinion A-36 and 37.

4. Subsequent History.

Subsequent to closing of the reservoir and transfer of the land in fee to the United States, the State of South Dakota has managed the Oahe Reservoir fishery. The State had stocked about seventy-two million fish in the developed reservoir from 1970 through the time of trial in 1988. District Court Opinion, A-85; Exhibit 114. Further, the State has conducted scores of fish surveys, species composition surveys, reproduction studies and studies on the introduction of fish. See, e.g. District Court Opinion, A-85 to 86; See also TT 31-32, 75, 93-96, 102-106, 230. Critically, South Dakota regularly enforced its hunting and fishing laws against non-Indians throughout the "taken area" on both the shoreline and upon

the waters of the Missouri River itself.⁶ District Court Opinion, A-85; 86; PH 127, 144-146, TT 433, 442, 444, Exhibit 140.

⁶See n.2, supra. The District Court made a general finding that the tribe "enforced its [hunting and fishing] regulation against all violators" on the lands in dispute. District Court Opinion A-73. The Court, however, made no findings in this opinion as to the frequency, vigor or manner of the tribal enforcement. (See, as the low level of tribal activity, District Court Memorandum Opinion which denied a preliminary injunction, at A-171). Moreover, the District Court's ultimate finding was that the tribe need not regulate hunting and fishing activities on the taken area. . . to protect its political interiority, economic security or health or welfare." District Court Opinion A-89. In this regard, it is also of note that the tribal chairman admitted that the Tribe had never brought a civil or criminal enforcement proceeding against any non-Indian for hunting and fishing activity on the reservation, including necessarily the taken area, prior to this litigation. See TT 548-549, see also TT 517; see also Exhibit 284. The Court of Appeals did not analyze these District Court's findings, nor did it adjudge the appropriate weight to be given them, if any, in a Montana-Brendale analysis presumably because its principal analysis was based on United States v. Dion, as set forth below.

Through South Dakota's management the Oahe walleye fishery has been developed into an asset with a national reputation. District Court Opinion, A-85. TT 100-101. The State has also developed a nationally known salmon fishery where none existed before. TT 36; see District Court Opinion, A-85.

The Tribe, in contrast, has essentially ignored the Missouri River throughout its history. As a BIA researcher has stated in Lawson, Reservoir and Reservation: the Oahe Dam and the Cheyenne River Sioux, 37 S.D. Historical Collections 102, 158 (1974):

Though the river contained a wide variety of fish, the Indians never learned to exploit this food source and forms of water recreation such as swimming and boating were also uncommon activities.

Similarly, Senate and House reports compiled in the 1940's and 1950's made it clear that:

Fishing is not important on either reservation at this time.

S.R. No. 1737, 81st Cong., 2d Sess. 1954 p. 5. See also, H.R. No. 1047, 81st Cong., 1st Sess. (1948), p. 4. At the time the litigation was commenced the Tribe had never done any stocking of fish on the Missouri River, had never done fish surveys, species composition surveys or reproduction surveys on the Missouri River, and had no docks or ramps going to the Missouri River. TT 506, 521. See also, District Court Opinion, A-81. The Tribe presently a "Wildlife Management Plan" to the District Court at trial but even this plan failed to include any Missouri River fish development. TT 839-840. The Tribe admitted that it had no plans for development of the Missouri River at the time of trial of this matter. TT 506, 521, 839-840.

REASON FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF
APPEALS CONFLICTS WITH OPINIONS OF
THIS COURT.

A. Lands acquired from Indians.

1. The Court of Appeals decision with regard to lands acquired from Indians conflicts with Montana and Brendale.

In Montana, this Court considered whether a tribe could exercise civil regulatory authority for hunting and fishing purposes over non-Indians on fee lands taken under the General Allotment Act and the Crow Allotment Act. The Court considered two potential "sources" for the tribal regulatory power--treaties and inherent sovereignty. With regard to a treaty right, this Court stated that the 1868 Treaty had "arguably conferred upon the Tribe the authority to control fishing and hunting on those lands." 450 U.S. at 558-559. The Court held,

however, that this "arguable"⁷ authority could extend only to land on which the Tribe exercises "absolute and undisturbed use and occupation." 450 U.S. at 559.

Because the tribe did not have "absolute and undisturbed use and occupation" of the land taken as a result of the General Allotment Act, the power arguably created or reserved under the 1868 Treaty to restrict or prohibit non-Indian hunting or fishing on the reservation "cannot apply to lands held in fee by non-Indians." Id.

Thus, to determine whether a treaty right even arguably applies to a particular

⁷ Montana does not hold, of course, that a treaty right to exclude can be translated into a treaty right to regulate; Montana suggests only that this proportion is an "arguable" one. It is more consistent with both Montana and Brendale to find a tribal right to regulate only when the non-Indian expressly or implicitly consents to tribal regulation.

parcel of fee land on the reservation the question to be asked is whether the tribe at the present moment exercises "absolute and undisturbed use and occupation." 450 U.S. at 559. When it does not, Montana requires a finding that no treaty right exists to regulate non-Indians on the land in question.

Second, Montana examines whether the Tribe has inherent power to regulate non-Indians in the particular situation at issue. According to Montana, the Tribes' remaining inherent powers are those relating only to internal relations or to "relations among members of a tribe." 450 U.S. at 564, quoting United States v. Wheeler, 435 U.S. 313, 326 (1978).

According to this Court, the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot

survive without express congressional delegation." 450 U.S. at 564.

Montana thus establishes a general rule for determining whether a tribe may have jurisdiction over non-Indians, a rule which carefully takes into cognizance both treaty rights and inherent rights.⁸

⁸Montana also suggested two possible exceptions to its general rule. The first exception, relating to "consensual relations" which give rise to tribal regulatory jurisdiction over nonmembers, plainly does not exist here. The second exception, relating to the potential existence of tribal civil regulatory jurisdiction over a nonmember when the action of the nonmember has a particular "direct effect" on the tribe or its members, was rejected by the four Justice plurality in Brendale which held that certain nonmember activities could give rise to federal court, not tribal court jurisdiction. 492 U.S. at 431.

It is also worthy of note that the District Court found that the Montana "direct effect" exception did not apply in this case when it found that the Tribe "need not regulate the hunting and fishing activities of nonmembers on the taken area . . . to protect its political integrity, economic

(Footnote Continued)

Similarly, the four Justice plurality in Brendale treats the "right to exclude" and "inherent sovereignty" as the basis of the tribal argument to regulate nonmembers on a reservation. The four Justice plurality stated, as to the treaty right argument, that the Court in Montana had:

flatly rejected the existence of power, derived from the power to exclude, to regulate activities on lands from which tribes can no longer exclude nonmembers.

492 U.S. at 424.

The four Justice plurality in Brendale also rejected the claim relating to "inherent sovereignty" because this concept could be

(Footnote Continued)
security or health or welfare." District Court Opinion A-35. In any event, as noted above, the critical point is that the Eighth Circuit Court of Appeals did not rely on the rule of Montana or Brendale, or any exception to the rule of those cases.

properly applied only to the tribes "internal relations":

Regulation of "the relations between an Indian tribe and nonmembers of the tribe" is necessarily inconsistent with a tribe's dependent status, and therefore tribal sovereignty over such matters of "external relations" is divested."

492 U.S. at 427 quoting, United States v. Wheeler, 435 U.S. 313, 326 (1978). The four Justice plurality in Brendale thus found that even when the claims of treaty rights based on the power to exclude and inherent sovereignty failed, the Tribe and its members still had a remedy in federal court against the actions of a non-Indian when his actions were "demonstrably serious" and in fact imperiled the tribe.

Finally the pivotal opinion of Justices Stevens and O'Connor in Brendale, finds:

the proper resolution of these cases depends on the extent to which the Tribe's virtually absolute power to exclude has

either been diminished by federal statute or voluntarily surrendered by the Tribe itself.

492 U.S. at 433 (emphasis added).

The Court of Appeals, however, refused to apply Montana-Brendale, effectively limiting that the rule of these cases to Allotment Act situations. Circuit Court Opinion, A-26 and 27; A-39, A-41 at n.18. Of course, a footnote in Montana does cite to the special characteristics of the Allotment Act itself, stating:

It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would be subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

450 U.S. at 559 n. 9. The Montana footnote, however, is but an answer to the Court of Appeal's view in Montana that the Allotment Acts actually supported tribal jurisdiction. Id. This Court appropriately found that

precisely the opposite was true. The footnote, moreover, continues, stating "what is relevant is the effect of the land alienation occasioned by that policy on Indian treaty rights" 450 U.S. at 559 n.9 (emphasis added). The Court thus emphasized that it is the alienation of land itself, (and not the means of alienation) and the consequent loss of the power to exclude, which preclude a finding that the treaty power allows regulation of nonmembers on the area involved.

By spurning a Montana-Brendale analysis, the Court of Appeals' decision clearly conflicts with decisions of this Court.⁹

⁹If the appropriate analysis had been made, the Court of Appeals would have concluded that the Tribe had no right to regulate non-Indians on the federally owned fee land. First, it is clear that no right to exclude exists on this land. Section 4 of (Footnote Continued).

2. The Court of Appeals erred failing to find that the 1954 Taking Act was the equivalent to the Allotment Acts under Montana-Brendale.

(Footnote Continued)

the Flood Control Act of 1944, Pub. L. 534, 58 Stat. 889 (1944) § 4, 16 U.S.C. § 460d requires that the "water areas of all such projects will be open to public use generally," The 1954 Cheyenne River Act, 68 Stat. 1193, provides that the tribes "right to hunt and fish in and on the shoreline and reservoir [is] subject, however, to regulations governing the corresponding use by other citizens of the United States. (emphasis added). Thus, the tribe could not, consistent with this legislation exclude nonmembers or non-Indians from the "taken area." The Court of Appeals found, in fact, that the Tribe was not "free entirely to exclude non-Indians" from the taken area even under its incorrect decision. Circuit Court Opinion, A-42. Thus no treaty right exists in this case.

Further, the entire issue is one regarding the "external relations" of the Tribe with nonmembers; the tribe has been deprived of this jurisdiction as a result of its dependent status. According to the plurality opinion of Justice White in Brendale, the Tribes' only remedy is an action in federal court. Thus the tribe has no civil regulatory jurisdiction over nonmembers on any non-Indian fee land in this case because it may not exclude non-Indians from the land and because the matter is one involving the tribe's "external relations."

The 1954 Taking Act at issue clearly contemplated the eventual elimination of tribal government and was thus the functional equivalent of the Allotment Acts cited to in Montana and Brendale. The Court of Appeals below erred in failing to so find.¹⁰

The Cheyenne River Taking Act was enacted in 1954. Just one year earlier, Congress had enacted H.R. Con. Res. 108 which stated that the policy of Congress was "as rapidly as possible" to subject the Indians to the "same privileges and responsibilities as are applicable to other citizens of the United States, [and] to end their status as wards of the United States. . . ." See

¹⁰The Court of Appeals seems not to have squarely considered whether the 1954 Cheyenne River Act was the equivalent of the allotment acts, through the point was effectively raised before that Court. See Circuit Court Opinion, A-9, n.7.

Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 488 n.32 (1979). According to this Court, this "policy reflected a return to the philosophy of the General Allotment Act of 1887" Id. The 1954 Cheyenne River Act was clearly part of the effort in the early 1950's through the late 1960's to terminate the reservations in accordance with the resurgent General Allotment Act philosophy, as is demonstrated by the legislative history. Representative Berry, arguing for adoption of the 1954 Cheyenne River Act, directly tied the Act to other legislation "which will terminate the federal supervision over six groups of Indians. . . ." ____ Cong. Rec. 13160 (Aug. 3, 1954). Likewise, the Department of the Interior, in its letter of March 19, 1954, printed at H.R.Rep.No. 2484, 83rd Cong., 2d Sess. (1954), at 13, describing

facilities to be provided to the Indians stated:

During this period of time [six to eight years] the situation of the Indians may change appreciably, particularly in view of the national policy of terminating special Federal services of a public nature to Indians by transferring responsibility for such services to the States and their local subdivisions. (Emphasis added)

Indeed, the Tribe itself, in its "Memorial to the 83d Congress," stated that:

We are convinced that we have set out fully and we think we have shown conclusively that the Sioux Tribe of the Cheyenne River Reservation should be placed on a position to take over their own affairs and ultimately released as wards of the United States. The pending Oahe bills, as introduced, should be passed by Congress.

Memorial, supra, at 35. Thus, assuming that Montana-Brendale require that an act be part of a termination drive to allow application of the rule of these cases, the 1954 Taking

Act meets that requirement and the Court of Appeals erred in concluding otherwise.

3. The Court of Appeals erred in applying the reasoning of the United States v. Dion to lands acquired from Indians instead of applying the reasoning of Montana and Brendale.

The Court of Appeals erroneously applied the standards for treaty abrogation with regard to rights of tribal members to this case which, in fact, involves the rights of nontribal members. As discussed above, the Montana-Brendale doctrine governs the issue of tribal regulatory jurisdiction over non-Indians on fee land on the reservation.

In neither Montana nor Brendale did this Court demand a showing that Congress had "actually considered" the conflict between a treaty provision and its intended action; rather the issue was whether, following the transfer of land, the Tribe had "'absolute and undisturbed use and occupation," of the

land and whether the matter involved the internal relations of the Tribe. Montana, 450 U.S. at 559, 564; Brendale, 492 U.S. at 424, 427 (opinion of Justice White); see also 492 U.S. at 433 (opinion of Justice Stevens); 492 U.S. at 448 (opinion of Justice Blackmun)

In contrast, United States v. Dion, 476 U.S. at 739-740 requires a conscious plan on the part of Congress to abrogate a treaty right, in particular the right to hunt eagles, belonging to tribal member and exercisable by him. The focus in Montana and Brendale is on the effect of the congressional action on the authority of the tribe over a non-Indian; in Dion the focus is on whether Congress had actually considered and accomplished the abrogation of a treaty right exercisable by an Indian. This case accordingly provides an opportunity for this Court to set out the appropriate application of Dion, on the one hand, and

Montana-Brendale, on the other, to situations involving land no longer in Indian ownership on the reservation.¹¹

4. The Court of Appeals decision below unduly restricts the language of Dion.

Even assuming arguendo applicability of Dion to the rights of nonmembers on lands taken in fee by the United States, the circuit court misapplied Dion. Dion requires actual consideration of a conflict between treaty rights and its intended action. 476 U.S. at 740. In Dion, such consideration was demonstrated by the specific language of the

¹¹It is notable that Dion and Montana-Brendale have proceeded on separate tracks. Dion did not cite Montana although Montana had itself been decided five years earlier. Brendale did not cite Dion although Dion had been decided for three years at the time the Brendale opinion was rendered. Indeed, none of the three opinions in Brendale mentions Dion, which is additional evidence of the conflict of the Court of Appeals with the jurisprudence of this Court.

Eagle Protection Act which allowed the taking of eagles "for the religious purposes of Indian tribes" 476 U.S. at 740. The requisite language is also contained in the Act at issue here and the Court of Appeals erred in interpreting the Act otherwise. In the 1954 Taking Act, the extent of the rights of tribal members to hunt and fish remaining after the Act was set out specifically in Section X of Public Law 776. Congress provided in Section X that members of Tribe would have without cost only the right of "free access" to the shoreline and reservoir "including the right to hunt and fish"; this right was specifically made subject to regulations "governing the corresponding use by other citizens of the United States."

The tribal right remaining after the 1954 Taking Act was merely a right of "access" to "hunt and fish," not a right to regulate others. Furthermore, the

specification of the remaining right in Section X evidences that Congress had actually "considered" the conflict between treaty rights and its intended action and had "resolved" the issue against the Tribe pursuant to Dion. Therefore, even if the 1954 Taking Act is assessed under Dion, -- which the State submits should not have been done--the Court of Appeals erred in its interpretation of the Act.

B. The Court of Appeals decision failed properly to apply Montana - Brendale to lands acquired from non-Indians.

As noted above, 18,000 acres of land was acquired for construction and operation of the Oahe Reservoir from non-Indians under the general authority of the 1944 Flood Control Act. The Court of Appeals did not reverse outright the holding of the District Court that the tribe had no jurisdiction over non-Indians on these lands, but did remand the issue to the District Court for

consideration of two factors. First, Court of Appeals suggested to the District Court that if it found that the lands had been originally acquired by non-Indians from Indians other than through "an allotment act" the analysis "may well be" that Montana did not apply to the cases. Circuit Court Opinion at A-45, n.19. Petitioner has demonstrated at length above that Montana-Brendale are not applied to Allotment Act cases alone, but to any lands owned or controlled by any person other than a tribal member. Thus the suggestion of the Court of Appeals and its implied direction to the District Court are erroneous.

Second, the Court of Appeals misapplied Montana-Brendale. The Court of Appeals found that if either of the two Montana exceptions does, in fact, apply, the result would be that the tribe "retains" regulatory authority over the non-Indian activity. Circuit Court

Opinion at A-46 n.20. Justice White in his plurality opinion in Brendale, however, made it clear that the second of the two Montana exceptions, i.e. that relating to impact of nonmember activity on the political integrity, economic security or health and welfare of the tribe, would give rise to federal court, not tribal court jurisdiction. 492 U.S. at 431. The opinion of the Brendale plurality gives proper respect to the case law of this Court commencing in 1809 when Justice Johnson, concurring in Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 147 (1809) stated that "[a]ll the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets, and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves."

Likewise, the Brendale plurality opinion appropriately puts the federal courts, and not the tribal courts, in the role of adjudicating disputes of the tribe involving its "external affairs." This is especially appropriate given the exclusionary nature of the tribal governments recently recognized in Duro v. Reina, 495 U.S. 676, 693 (1990). Finally, the Brendale plurality gives proper credence to tribal jurisdiction when appropriate, i.e., when the nonmember or non-Indian implicitly or explicitly consents to tribal jurisdiction.

C. This controversy has broad practical implications.

1. Federal lands.

The decision of the Court of Appeals in this instance has the potential to affect every fee holding of the United States within an Indian reservation made for public purposes. For example, acquisitions of land

from Indians for national parks, national monuments, waterfowl production areas, national forests, and reservoirs will not be governed by Montana-Brendale but rather the much more stringent standard set out in Dion if the acquisitions have not been filtered through an "allotment act."

For example, with regard to reservoir lands and overlying waters, it is estimated that beyond the acreage directly at issue here, there are an additional 100,000 to 200,000 acres of federal lands and overlying waters taken from Indians for Missouri River mainstem reservoirs on other reservations in North and South Dakota.¹² This includes area taken from the Standing Rock, Crow Creek, Lower Brule, and Fort Berthold reservations

¹²This estimate is based on the relative land areas involved.

for the Oahe, Big Bend and Garrison Reservoirs. These "taken areas" have in the past generally been regarded as public areas open to hunting and fishing by non-Indians with a state license only.¹³

National Grasslands also are important in certain western states. It is estimated that 20,000 acres of federally owned

¹³The Lower Brule "taken area," however, has been a subject of a five year settlement agreement which, inter alia, split jurisdiction between the state and tribe within the "taken area;" the agreement was judicially extended in relevant part through a preliminary injunction in recently filed litigation. See, L.B.S.T. v. S.D., Civ. No. 91-3036 (D.S.D.). A 1979 atlas produced by the Corps of Engineers for Lake Sharpe, which borders both the Lower Brule and Crow Creek Reservations, states: "Hunting and fishing is allowed on the lake and project land in accordance with the rules and regulations established by South Dakota Department of Game, Fish and Parks and the United States Fish and Wildlife Service." United States Army Corps of Engineers, Omaha District, Boating and Recreation, Lake Sharpe, Big Bend Dam, Chamberlain, South Dakota (Revised 5-79).

grasslands are found in the Grand River National Grassland in the southwest corner of the Standing Rock Reservation in South Dakota. See, U.S. Department of Agriculture, Forest Service Visitors Map, Grand River-Cedar River National Grasslands, North and South Dakota, Fifth Principal and Black Hills Meridian (1981). Again, non-Indians have hunted throughout the years with only a state license and have been subject to state, not tribal jurisdiction.

Furthermore, it is clear that thousands of acres of other federally owned fee land is found nationally in the form of national monuments on reservations (such as the Badlands National Monument found in part on the Pine Ridge Reservation in South Dakota), waterfowl production areas which are periodically opened to public hunting under state rules and regulations, national forests, and holdings of other agencies

including the Bureau of Land Management. See, e.g., South Dakota Department of Game, Fish and Parks, South Dakota Sportsman's Atlas, 1990.

The decision of the Court of Appeals has the potential to affect the analysis given to each of these pieces of land.

2. Non-federal lands.

Of equal concern is the potential impact of the decision of the Court of Appeals on lands acquired by non-Indians (or by the states) under acts other than the Allotment Act. The Court of Appeals did not identify any factor which would all its decision to be limited lands acquired by the United States itself and in fact suggested that non-Allotment Act lands held by non-Indians on reservations were not subject to a Montana-Brendale analysis. See Circuit Court Opinion at A-45, n.19.

There are, of course, a variety of non-Indian fee lands on the reservations which were not acquired through the Allotment acts. South Dakota estimates that over 750 miles of state roads are found within reservations in South Dakota alone; in an undetermined but substantial proportion of this mileage, the ownership or right of way was acquired other than through an allotment act. The mileage nationally is certainly significant. Just as the respondent tribe now is publicly asserting the authority to exercise civil regulatory jurisdiction to impose forfeiture and civil penalties on non-Indians on the federal lands and overlying water associated with the Oahe Reservoir, so this or other tribes may also attempt to exercise civil regulatory jurisdiction to impose such civil penalties on portions of highways which were taken into

fee or taken into easement status other than through an Allotment Act.

Similarly, rights of way acquired other than through an allotment act for railroads, telephone companies, oil and gas companies and other utilities on reservations are subject to the same claim. See, Burlington Northern Railroad Co. v. Blackfeet Tribe of the Blackfeet Indian Reservation, No. 91-545. (Petition for Certiorari pending).

In sum, it appears that significant parcels of land on reservations have passed into non-Indian hands through acts other than the Allotment Acts and that the problems raised by the circuit court's decision are, from the prospective of the states, likewise significant.¹⁴

¹⁴A recent case of this Court, County of Yakima v. Yakima Indian Nation, ___ U.S. ___, (Footnote Continued)

CONCLUSION

For the foregoing reasons the Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

MARK BARNETT*
ATTORNEY GENERAL
State of South Dakota
500 East Capitol
Pierre, South Dakota 57501-5070
(605) 773-3215

JOHN P. GUHIN
Deputy Attorney General
Office of the Attorney General
500 East Capitol
Pierre, South Dakota 57501-5070
(605) 773-3215

*Counsel of Record

(Footnote Continued)

116 L.Ed. 687, 705 (1992) drew attention to the fact that certain tribal members had acquired land in fee other than through an allotment act. Presumably some of that land has also passed to non-Indian ownership and would be subject to the controversy the State now places before this Court.